

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

HEBER SHANE GREEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Kevin D. Hull

BRIEF OF APPELLANT

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A. INTRODUCTION

At sentencing, following appellant Heber Shane Green's plea of guilty to child molestation, the trial court imposed numerous community custody conditions. These community custody conditions were ordered for the remainder of Green's life. A remand for resentencing is required where four of the conditions must be stricken because they are either not crime-related or unconstitutionally vague.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing a community custody condition to "not possess or access any sexually explicit material or frequent adult bookstores, arcades or places where sexual entertainment is provided." CP 99 (Condition 15).

2. The trial court erred in imposing a community custody condition to "not access sexually explicit materials that are intended for sexual gratification." CP 99 (Condition 16).

3. The trial court erred in imposing a community custody condition to "[a]bide by a curfew set by the Community Corrections Officer." CP 99 (Condition 22).

4. The community custody condition "to inform your Community Corrections Officer of any romantic relationships to verify

there are no victim-age children involved” is unconstitutionally vague. CP 99 (Condition 19).

5. In the event the State substantially prevails on appeal this Court should deny any request for costs.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should community custody conditions 15, 16, and 22 be stricken because they are not crime-related where there is no nexus between the conditions and the crime? (Assignment of Errors 1, 2, 3).

2. Should community custody condition 19 be stricken because it is unconstitutionally vague where it fails to define the prohibition with sufficient definitiveness and fails to provide ascertainable standards that protect against arbitrary enforcement? (Assignment of Error 4).

3. If the State substantially prevails on appeal, should this Court exercise its discretion and deny costs because Green is presumably still indigent where there has been no evidence provided to this Court, and there is no reason to believe, that his financial condition has improved or is likely to improve? (Assignment of Error 5).

D. STATEMENT OF THE CASE

On January 26, 2016, the State charged appellant Heber Shane Green with one count of child molestation in the first degree involving domestic violence. CP 1-3. The State filed a motion to dismiss on August

10, 2016, and the court entered an order of dismissal without prejudice. CP 25-28. The State filed a “first amended information” on September 6, 2016, charging Green with one count of child molestation in the first degree involving domestic violence. CP 29-32.

On March 27, 2017, Green pleaded guilty to one count of child molestation in the first degree involving domestic violence. CP 60-70; 03/27/2017 RP 2-5. On May 5, 2017, the court sentenced Green to 67 months in confinement, imposed community custody conditions, and ordered legal financial obligations. CP 88, 90, 92, 98-99; 05/05/17 RP 21-26.

The court entered an order of indigency for appeal and Green filed a timely notice of appeal. CP 104-117, 120-21.

E. ARGUMENT

1. COMMUNITY CUSTODY CONDITIONS 15, 16, AND 22 MUST BE STRICKEN BECAUSE THEY ARE NOT CRIME-RELATED.

Under the Sentencing Reform Act of 1981 (SRA), as part of any term of community custody, the trial court may order an offender to “[c]omply with any crime-related prohibitions.” RCW 9.94A.703(3)(f). Any community custody condition imposed in excess of statutory authority is void. *State v. Paulson*, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether the court had statutory authority to impose a condition is reviewed

de novo. *State v. Johnson*, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). If the court had statutory authority, its decision to impose a condition is reviewed for abuse of discretion. *Johnson*, 180 Wn. App. at 326 (citing *State v. Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010)(citing *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008)).

The SRA defines “crime-related prohibition,” in relevant part, as an “order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). The community custody condition must be directly related to the crime, but it need not be causally related to the crime. *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008). There must be a nexus between the condition and the crime. *Johnson*, 180 Wn. App. at 330-31.

Condition 15 states, “Do not possess or access any sexually explicit material or frequent adult bookstores, arcades or places where sexual entertainment is provided.” CP 99.

Condition 16 states, “Do not access sexually explicit materials that are intended for sexual gratification.” CP 99.

Condition 22 states, “Abide by a curfew as set by the Community Corrections Officer.” CP 99.

The Statement of Defendant on Plea of Guilty to Sex Offense indicates that instead of making a statement, Green agreed “that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.” CP 69. There must be a factual basis for concluding the community custody condition is crime-related. *State v. Parramore*, 53 Wn. App. 527, 531, 768 P.2d 530 (1989)(citing DAVID BOERNER, SENTENCING IN WASHINGTON section 4.5 (1985)).

A review of the statement of probable cause reveals that there is absolutely nothing that establishes a factual basis for concluding that the aforementioned conditions are crime-related. CP 33-34. In imposing conditions 15 and 16, the court stated, “I do believe that the allegations in this case and what’s being requested with those conditions are reasonably and rationally related and connected to the crime.” 05/05/17 RP 22. To the contrary, there was no evidence that the crime involved sexually explicit material, adult bookstores, arcades, or places of sexual entertainment. Furthermore, there was no evidence that the crime necessitated a curfew. According to the statement of probable cause, EKG reported that the incidents occurred at home.

The conditions are not crime-related because there is no nexus between the conditions and the crime. Consequently, Green’s case must be

remanded for the trial court to strike conditions 15, 16, and 22 based on the lack of the requisite nexus between the crimes and the prohibited activities. *State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

2. COMMUNITY CUSTODY CONDITION 19 MUST BE STRICKEN BECAUSE IT IS UNCONSTITUTIONALLY VAGUE IN VIOLATION OF DUE PROCESS.

Generally, imposing community custody conditions is within the discretion of the sentencing court and will be reversed if manifestly unreasonable. *State v. Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). The imposition of an unconstitutional condition is manifestly unreasonable. *Id.* at 792. There is no presumption that a community custody condition is constitutional. *Id.*

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington constitution requires that citizens have fair warning of proscribed conduct. *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). A condition is unconstitutionally vague if it (1) does not define the prohibition with sufficient definitiveness that ordinary people can understand what conduct is proscribed or (2) does not provide ascertainable standards that protect against arbitrary enforcement. *Id.* at 752-53. If either requirement is not met, the condition is unconstitutional. *Id.* at 752. However, a condition is not unconstitutionally vague merely because a person cannot predict with

complete certainty the exact point at which his actions would be classified as prohibited conduct. *Valencia*, 169 Wn.2d at 793.

.Condition 19 states that Green shall inform his Community Corrections Officer of “any romantic relationships to verify there are no victim-age children involved.” CP 99. In *State v. Norris*, 1 Wn. App. 2d 87, 404 P.3d 83 (2017), the Court recognized that the term “romantic” is “highly subjective.” *Id.* at 87. While discussing *United States of America v. Reeves*, 591 F.3d 77 (2d Cir. 2010), the Court observed that the Second Circuit concluded a condition that required the defendant to notify the probation department when he establishes a “significant romantic relationship” was unconstitutionally vague:

What makes a relationship “romantic,” let alone “significant,” in its romantic depth, can be the subject of endless debate that varies across generations. For some, it would involve the exchange of gifts such as flowers or chocolate; for others, it would depend on acts of physical intimacy; and for still others, all of these elements could be present yet the relationship, without a promise of exclusivity, would not be “significant.”

Norris, 1 Wn. App 2d at 87 (quoting *Reeves*, 591 F.3d at 81).

The *Reeves* Court “easily” concluded that “people of common intelligence (or, for that matter, of high intelligence) would find it impossible to agree on the proper application of a release condition triggered by entry into a ‘significant romantic relationship.’ ” 591 F.3d at 81.

The community custody condition here does not contain the term “significant,” but nonetheless the term “romantic” is unconstitutionally vague. When a term is not defined, the court may ascertain its plain and ordinary meaning from a standard dictionary. *State v. Sullivan*, 143 Wn.2d 162, 184-85, 19 P.3d 1012 (2001). “Romantic” is ordinarily defined as “imaginary, visionary, having an imaginative or emotional appeal.” THE MERRIAM-WEBSTER DICTIONARY 631 (2004). Based on this definition, the condition lacks sufficient definitiveness where an interpretation of “romantic” is clearly subjective. Consequently, there is no assurance that ordinary people can understand what conduct is proscribed. Furthermore, the condition fails to provide ascertainable standards that protect against arbitrary enforcement. As this Court concluded in *Johnson*, “Subjective terms allow a standard sweep that enables state officials to pursue their personal predilections in enforcing the community custody conditions.” 180 Wn. App. at 327 (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 180 n.6, 795 P.2d 693 (1990)(quoting *Kolendar v. Lawson*, 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983))).

A defendant can raise a vagueness challenge to community custody conditions for the first time on appeal. Condition 19 is unconstitutionally vague and therefore a remand for resentencing is required for the court to strike the condition. *Bahl*, 164 Wn.2d at 761-62.

3. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD EXERCISE ITS DISCRETION AND NOT AWARD COSTS BECAUSE GREEN REMAINS INDIGENT.

Under RCW 10.73.160 and RAP Title 14, this Court may award costs to a substantially prevailing party on appeal. RAP 14.2 (amended effective January 31, 2017) provides in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

National organizations have chronicled problems associated with legal financial obligations (LFOs) imposed against indigent defendants. These problems include increased difficulty in reentering into society, the doubtful recoupment of money by the government, and inequity in administration. *State v. Blazina*, 82 Wn.2d 827, 835, 344 P.3d 680 (2015)(citing, et al., AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS (2010)). In 2008, The Washington State Minority and Justice Commission issued a report that assessed the problems with the LFO system in Washington. The

report points out that many indigent defendants cannot afford to pay their LFOs and therefore the courts retain jurisdiction over impoverished offenders long after they are released. Legal or background checks show an active court record for those who have not paid their LFOs, which can have negative consequences on employment, on housing, and on finances. *Blazina*, 182 Wn.2d at 836-37.

In *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000), the Washington Supreme Court concluded that an award of costs “is a matter of discretion for the appellate court, consistent with the appellate court’s authority under RAP 14.2 to decline to award costs at all.” The Court emphasized that the authority “is permissive” as RCW 10.73.160 specifically indicates. *Nolan*, 141 Wn.2d at 628. The statute provides that the “court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” RCW 10.73.160(1)(emphasis added).

In the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs where the trial court determined that Green is indigent. The trial court found that Green is entitled to appellate review at public expense due to his indigency and entered an Order of Indigency. CP 120-21. This Court should therefore presume that Green remains indigent because the Rules of Appellate

Procedure establish a presumption of continued indigency throughout review:

Continued Indigency Presumed. A party and counsel for the party who has been granted an order of indigency must bring to the attention of the appellate court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefit of an order of indigency throughout the review unless the appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

There has been no evidence provided to this Court, and there is no reason to believe, that Green's financial condition has improved or is likely to improve. Green is therefore presumably still indigent and this Court should exercise its discretion to not award costs where there is no basis for the commissioner or clerk to determine by a preponderance of evidence that the his financial circumstances have significantly improved since the last determination of indigency.

F. CONCLUSION

For the reasons stated, this Court should remand for resentencing.

In the event the State prevails on appeal, this Court should deny costs.

DATED this 18th day of January, 2018.

Respectfully submitted,

/s/ Valerie Marushige

VALERIE MARUSHIGE

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Attorney for Appellant Heber Shane Green

DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Kitsap County Prosecutor's Office and by U.S. Mail to Heber Shane Green, DOC # 398851, Coyote Ridge Corrections Center, P.O. Box 769, Connell, Washington 99326.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of January, 2018.

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